No. 250

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In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, APPELLANT

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OF APPELLEE NEW WRINKLE, INC.

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1. This antitrust suit was brought against two defendants, New Wrinkle, Inc. and The Kay & Ess Company. The complaint alleged that they had conspired to restrain interstate commerce by using patent licenses to fix prices for goods sold in interstate commerce. Defendant New Wrinkle moved to dismiss on the ground, which it characterized as jurisdictional, that since it is not engaged in interstate commerce, it could not be guilty of violating the Sherman Act. Defendant Kay &

Ess moved to dismiss on the ground that the complaint failed to state a case upon which relief could be granted, in that reasonable price conditions attached to a patent license did not violate the Sherman Act. The District Court in two identical orders, one for each defendant, finding that "the motion is well taken," granted the motions, and dismissed the complaint without filing any opinion.

In view of the failure of the District Court to set forth any specific reasons for its action, the Government's Assignment of Errors followed the language of the two orders of dismissal and merely assigned as error the granting of the motion to dismiss and the "finding that defendants' motions to dismiss were well taken." In the Questions Presented in its Statement as to Jurisdiction the Government set forth three questions with respect to the rights of a patentee to fix prices [all of which related to the point raised by Kay & Ess], but did not mention the commerce question raised by New Wrinkle. The commerce point was discussed summarily, however, in footnote 3, as follows:

> New Wrinkle also contended that mere licensing is not commerce and that New Wrinkle's licensing activities are therefore not in restraint of interstate commerce. This contention appears almost frivolous. The complaint charges fixing of the sales price of licensees and alleges that "a substantial portion" of the licensees' products are sold and shipped in interstate commerce.

2. Motions to dismiss the Government's appeal have been filed by appellees. Since the motion filed by Kay & Ess goes to the merits of patent questions which have been adequately treated in the Statement as to Jurisdiction, it is unnecessary to deal with that motion here.

Appellee New Wrinkle argues in support of its motion to dismiss that the appeal of the United States is defective because of an alleged failure to appeal from the "jurisdictional" basis of the district court's dismissal of the complaint. This contention, although now characterized as jurisdictional, is in effect another way of saying that the complaint does not state a cause of action against this appellee because it fails sufficiently to show the interstate commerce involved.

The Assignment of Errors was sufficient to raise the question presented by New Wrinkle's motion to dismiss. In view of the absence of any specific statement of the grounds for the decision below the Government could only assign error in the same general terms as are contained in the District Court's order of dismissal. To the extent that the order may have been based on New Wrinkle's commerce contention, that ruling was properly challenged by the general assignments including the assignment of error to the "finding that the motion was well taken."

The reason for the failure of the Government to include the commerce question among the questions presented in the Statement as to Jurisdiction

was the belief that this contention, at variance with this Court's long settled interpretation of the Sherman Act,[1] was too frivolous to warrant more extensive treatment than the footnote reference in note 3 of the jurisdictional statement. (Quoted at p. 2, *supra*.) This reference to the commerce question was sufficient to indicate that the point was in the case, and that to the extent that the court below may have agreed with New Wrinkle's contention, the Government regarded its reasoning as erroneous. In any event, the statement of questions presented is not required in a Statement as to Jurisdiction (as it is in a petition for certiorari), and is merely included for the convenience of the Court to indicate what appellant considers to be the major issues for consideration. See Stern and Gressman, *Supreme Court Practice*, p. 223. Plainly, it does not supersede or waive the Assignment of Errors.

3. In order to demonstrate the complete lack of substance to New Wrinkle's argument that a restraint of interstate commerce was not properly alleged, and to show why the contention was not further dignified in the jurisdictional statement, it is sufficient to quote several passages from the complaint:

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[1] If a conspiracy is directed toward restraining interstate commerce or if it results in a restraint upon interstate commerce, it is immaterial whether the conspirators themselves are engaged in interstate commerce. *Loewe* v. *Lawlor*, 208 U.S. 274, 301; cf. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 233-234.

11. New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. However, it owns or controls patents relating to wrinkle finishes, and since 1938, has licensed and now licenses in excess of 200 manufacturing concerns to make, use, and sell wrinkle finishes under those patents.

12. Substantially all wrinkle finishes produced in the United States are manufactured by these licensees, whose places of business are located in principal cities throughout the various states. A substantial portion of the wrinkle finishes made by licensees is sold to purchasers in states other than those in which the finishes are manufactured and to purchasers in the Dominion of Canada, and is shipped from one state to another, and from various states of the United States to various locations in the Dominion of Canada in the ordinary course of business.

[Then follows a description of the offenses charged.]

* * * * *

23. The combination and conspiracy and the contracts, and the acts done in effectuation thereof, hereinabove described, have had the effect, as intended by the defendants and co-conspirators, of fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms for substantially all wrinkle finishes manufactured and sold in the United States, and of eliminating competition between

the defendants and co-conspirators in the sale of such finishes.

These allegations, of course, are admitted for purposes of dealing with the motions to dismiss.

The Government is not seeking a "premature" decision of "moot" questions, as appellee contends, but a resolution of the question upon which the court below has ruled—i.e., whether the complaint states a cause of action. In view of the generality of the court's ruling, the Government was not required to be more specific in its assignments.

CONCLUSION

For the foregoing reasons the motion to dismiss the appeal should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

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